101.

SUPREME COURT OF THE UNITED STATES.

No. 231.

ARTHURS, NICHOLSON & CO., PLAINTIFFS IN ERROR,

vs.

JESSE HART.

IN ERROR TO THE CIRCUIT COURT, U. S., FOR THE EASTERN DISTRICT OF LOUISIANA.

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[GIDEON, print.]

CIRCUIT COURT OF THE UNITED STATES,
Fifth circuit, and eastern district of Louisiana.

ARTHURS, NICHOLSON & CO.,
vs.
JESSE HART. } No. 1841.

Pleas and proceedings before the honorable circuit court, fifth circuit and eastern district of Louisiana, at a circuit court of the United States, in and for the fifth circuit and eastern district of Louisiana aforesaid, being the December term of said court, held at the city of New Orleans aforesaid, on the third day of April, A. D. 1851.

Be it remembered, that heretofore, to wit, on the sixteenth day of May, A. D. 1849, came John Arthurs, John Nicholson, Jonas R. McClintock, and William Stewart, by their attorney, John Livingston, esq., in the clerk's office of said court, and filed a petition which is in the words and figures following, to wit:

Petition.

To the honorable the circuit court of the United States, for the fifth judicial circuit, holding sessions in and for the eastern district of Louisiana:

The petition of John Arthurs, John Nicholson, Jonas R. McClintock, and William Stewart, all citizens and residents of the State of Pennsylvania, doing business at Pittsburgh, in said State, under the firm name of Arthurs, Nicholson & Co., respectfully represents that Jesse Hart, who is a citizen and resident of the State of Louisiana, and domiciliated within the jurisdiction of this honorable court, to wit, at West Baton Rouge, Louisiana, is truly and justly indebted unto petitioners in the full sum of two thousand five hundred and forty $\frac{65}{100}$ dollars, ($2,540 65,) with interest from the third day of February, 1849, with four $\frac{30}{100}$ dollars costs of protest, and ten per cent. damages; for this, to wit, that petitioners are owners and holders of a certain bill of exchange, dated Pittsburgh, Penn., March the first, 1848, payable twelve months after date, drawn to the order of James Arthurs & Brothers, and endorsed by them to petitioners, and drawn by Nicholson & Armstrong upon, and accepted by, Jesse Hart, for the sum of two thousand five hundred and forty $\frac{65}{100}$ dollars; all of which will more fully and clearly appear by reference to the annexed bill of exchange; that such bill was duly presented for payment and payment refused, and due protest made thereof, which fully appears from the annexed protest.

Petitioners allege that the drawers and endorsers of said bill all

reside in, and are citizens of, the State of Pennsylvania, and that this court has jurisdiction: Wherefore petitioners pray that said Jesse Hart be cited to appear and answer the petition; that after due proceedings, the defendant, Jesse Hart, be condemned to pay petitioners the full sum of two thousand five hundred and forty $\frac{6}{100}$ dollars, ($2,540 65,) with interest from the third day of March, 1849, and four $\frac{30}{100}$ dollars, costs of protest, and ten per cent. damages, and all costs of suit; and petitioners ask for all such and further relief as the nature of their case requires; and as in duty bound will ever pray.

JNO. LIVINGSTON,
Atty. for petitioners.

Answer filed November 16, 1849.

ARTHURS, NICHOLSON & CO.,
vs.
JESSE HART.
No. 1841.

CIRCUIT COURT OF THE UNITED STATES,
For the fifth judicial circuit, eastern district of Louisiana.

And now comes the defendant, by his counsel, and for answer to the plaintiffs' petition says, he admits his signature to the bill sued on, but denies all and singular the allegations contained in the plaintiffs' petition.

Respondent avers that in the fall of the year 1847 he employed Messrs. Nicholson & Armstrong, of Pittsburgh, to build for him a sugar mill and engine, for his plantation, in West Baton Rouge, in this State; and that they built and put up a sugar mill and engine upon respondent's plantation, but performed said work carelessly, negligently, and unskilfully, and not, as they were bound and had agreed to do, in a workmanlike manner.

That afterwards, they applied to respondent for a bill of exchange in liquidation of the balance of the price which respondent had promised to pay, and respondent then explained and made known to them the defective character of the machinery aforesaid, and declined to complete the payment of the price.

That therefore said Nicholson and Armstrong proposed the bill should be drawn and accepted, they promising and agreeing with respondent that they would, before the then next ensuing season for sugar grinding, send competent workmen to repair, put up anew, and otherwise complete, in a workmanlike manner, the said sugar mill and engine. Respondent relying upon their promises and agreements to complete the work, was induced to accept, and did accept, the bill sued on; and he avers if they had not agreed to furnish and put up in first rate running order and condition the machinery aforesaid, he would not have accepted said bill.

That said Nicholson and Armstrong have wholly failed and neglected to send and have said machinery put in order as they promised

when said bill was accepted, and said machinery is now in bad order, as it has always been.

Respondent further avers, that in consequence of their failure aforesaid he has suffered loss and damage to the amount of eighteen hundred and thirty-five dollars and sixty-five cents. That the season for sugar grinding, referred heretofore, commenced about October 15th, 1848, and ended about December 10th, 1848. That while said machinery was in operation during that season, it was frequently broken in consequence of inherent defects; the housen that sustains the rollers did not keep the rollers firmly in their places, and the cane therefore was not properly ground; it became necessary to stop the machinery, to screw the rollers down to the hausen, and to send to New Orleans for materials to make repairs, all occasioning delay, by which respondent lost two weeks in getting off his crop, which two weeks were the beginning of the rainy season, in which the labor of getting off the crops is much more difficult and expensive; and respondent avers, his crop would have yielded one thousand dollars more than it did yield had the said mill thoroughly ground the cane.

Respondent avers that the outlay to which he has already been subjected to make any use whatever of said machinery, and the expense now necessary to put it in good order, together with the sum he lost in deficiency of crop as aforesaid, amount to eighteen hundred and thirty-five dollars and sixty-five cents, as appears by the bill of particulars made part hereof. He further avers, that the plaintiffs, before and at the time of taking the bill sued on, had due notice of all the matters and things just recited; that the said bill was drawn, accepted, and delivered to the payees in the city of New Orleans, on the day of its date, and not in Pittsburgh; that it was written and dated by Nicholson and Armstrong, and not by respondent; that it was accepted and delivered to the payees, and that the complaints aforementioned by respondent to the drawers, and their promises and agreements as aforesaid, were made all in the presence and hearing of James Arthur, who was and is a member of the firm of James Arthur & Brother; of John Nicholson, a member of the firm of Arthur Nicholson, & Company, the plaintiffs herein, of which firm the said James Arthur was then and is now a member also.

Respondent further avers, that that said bill was never legally protested, no demand having been made of the acceptor, your respondent, who was not at the time of the protest, owner, captain, clerk, nor any other officer of the steamboat on board which he notary made the demand. Wherefore respondent pleads the want of amicable demand; he pleads in reconvention the sum mentioned in the bill of particulars, for which he asks for judgment against the plaintiffs in solido, and expressly denying the capacity of any of the parties mentioned in the petition to stand in judgment upon the said bill. He prays the plaintiffs' demand be rejected at their own costs, and for general relief.

E. L. GOOLD.

Bill of particulars made part of the foregoing answer.

Expenses already incurred in repairs to the sugar mill and engine in October, November, and December, 1848:

Lining cylinder and fixing steam pipe	$6 00
Raising housen, putting mill in line	20 00
Filling up between cascades and paving same	20 00
Alteration of brick work between boilers	10 00
Fitting new cap on housen	5 00
Eight brass gibs	3 50
Two cast iron plates	14 90
Drayage	50
1 return plate (for cane knife)	14 75
Planing same	5 00
Drayage	1 00
(Amount carried to next page)	$100 65
Amount brought from last page	100 65

Expenses necessary to put sugar mill and engine in good running order:

The housen, weight 2,800 lbs.	
Cap for same, 250 "	
Two wheels for cane carriers, 250 "	
Two washers, 150 " = 3,450 a 5.	172 50
Patterns for the above, to wit, housen $50, wheels $10, cap $5,	65 00
Freight from plantation to New Orleans and back	27 50
Drayage on same up and down	20 00
Alteration of the connecting steam pipe	15 00
Pattern for the same	8 00
Four feet of copper pipe	4 00
Metallic boxes (Babbit's metal)	25 00
Freight and drayage up and down	3 00
Boring out cylinder	40 00
Freight on the same up and down	10 00
Metallic packing for cylinder	15 00
Compensation to engineer for his services in putting on these repairs in full	300 00
New wall under main shaft and boiler	30 00
	835 65
Loss in crop, the same being deficient in quantity in consequence of defective machinery	1,000 00
	$1,835 65

And afterwards, to wit, on the 26th day of November, A. D. 1849, the following order was made by the court, and entered of record on the minutes:

ARTHUR, NICHOLSON & Co., vs. JESSE HART. } No. 1841.

On motion of E. L. Goold, esq., attorney for defendant, and on exhibiting to the court the affidavit of said defendant filed on the fifteenth instant, it is ordered that a commission issue to William Norris, or to any judge or justice of the peace, or any Louisiana commissioner at San Francisco, authorizing either of them to take the deposition of Benjamin W. Greenshower, witness for the defendant; and it is further ordered that a delay of four months be allowed for the execution and return of said commission.

And afterwards, to wit, on the 17th day of December, A. D. 1849, the following entry was made of record on the minutes, viz:

ARTHURS, NICHOLSON & Co., vs. JESSE HART. } 1841.

On motion of J. Livingston, esq., attorney for plaintiffs, it is ordered by the court that defendants show cause on Saturday next, the 22d instant, at 12 o'clock, m., why all that portion of the defendant's answer which alleges a conditional acceptance of the bill of exchange and failure of consideration should not be stricken out, *and why the defendant should not be stricken out*, and why the defendant should not go to trial on the plea of general issue and want of amicable demand on these grounds, to wit:

First. The acceptance of the bill being absolute and unconditional, no proof to contradict it can be received.

Second. The bill being accepted a long time after the alleged delivery of the engine and sugar mill, is full evidence of a settlement, and no evidence can now be received to change the character of that settlement.

Third. Because the plaintiffs, being the endorsers of the payee before maturity, cannot be held responsible for any equity between the drawer, payee, and acceptor.

And afterwards, to wit, on the 2d day of April, A. D. 1850, the following entry was made on the minutes:

ARTHURS, NICHOLSON & Co., vs. JESSE HART. } No. 1841.

This cause having been regularly assigned for this day was called up for trial, Livingston, esq., appearing for the plaintiffs, and E. L. Goold, esq., for the defendant. On the trial of the cause defendant's counsel admitted all the signatures to the bill sued on to the genuine. After argument the cause was submitted to the court, and taken under advisement.

And afterwards, to wit, on the 29th day of May, A. D. 1850, the

court rendered a judgment, which was entered of record on the minutes as follows:

ARTHURS, NICHOLSON & Co., vs. Jesse Hart. } 1841.

This cause having been argued and submitted to the court on a former day, and the court having delayed the decision of the same for the purpose of awaiting the return of a commission taken out by defendant, and now considering that a reasonable time has elapsed and the same has not been returned, and the court being of opinion that the law and evidence are in favor of the plaintiffs and against the defendant, doth now order, adjudge, and decree, that the plaintiffs, Arthurs, Nicholson & Co., do have and recover judgment against the defendant, Jesse Hart, for the sum of two thousand five hundred and forty dollars and sixty-five cents, with five per cent. interest from the third day of March, 1849, until paid, and five per cent. damages, with four dollars and thirty cents costs of protest, and costs of suit to be taxed.

Consent filed June 1, 1850. Circuit court, U. S.

ARTHURS, NICHOLSON & Co., vs. Jesse Hart. } No. 1841.

In this case it is agreed that the defendant may have until the 20th day of June for the return of the commission issued in this case, and that if on that day said commission is not returned, final judgment is to be rendered, and the examination of another witness on behalf of defendant is to be taken, if he can be found before the 20th instant.

JOHN LIVINGSTON, *for plaintiff.*

Consent, filed 25th June, A. D. 1850.

ARTHURS, NICHOLSON & Co., vs. HART. }

The testimony of Armstrong, on file, is to be received in evidence as if regularly examined in open court. The testimony of Donaldson, taken orally in open court, is to be received, and the cause is now submitted for final judgment.

E. L. GOOLD, *for defendant.*

N. O., June 24th, 1850.

And afterwards, to wit, on the 28th day of December, A. D. 1850, judgment was rendered in this case and entered of record in the minutes, as follows:

ARTHURS, NICHOLSON & Co., vs. JESSE HART. } 1841.

This cause having been submitted on a former day, and the court having considered the same, doth now order, adjudge, and decree, that the plaintiffs, Arthurs, Nicholson & Co., do have and recover judgment against the defendant, Jesse Hart, for the sum of seventeen hundred and forty-three dollars and fifty cents, with interest at the rate of five per centum per annum, from third day of March, 1849, with four dollars and thirty cents costs of protest and costs of suit.

And on the 2d day of January, A. D. 1851, the following entry was made on the minutes:

ARTHURS, NICHOLSON & Co., vs. JESSE HART. } No. 1841.

On motion of J. Livingston, attorney for plaintiff, it is ordered that the defendant show cause, on Saturday, 11th inst., at 10 o'clock, a. m., why a new trial should not be granted on the grounds on file.

Grounds for a new trial, filed January 1, 1851.

The judgment is contrary to law and evidence.

1st. Because the acceptor was bound, absolutely and at all events.

2d. Because the plaintiffs are third parties, and derived their ownership to the bill from the payees, who were unconnected with the drawers and plaintiffs, and as such are not bound by any equities between the acceptor and drawers.

3d. That there is no proof that the plaintiffs took the bill subject to any condition.

4th. That there is no proof damage, or that defendant ever paid for any repairs, &c., the evidence on this point being altogether speculative.

5th. That there was no proof of default; that the drawers and the plaintiff never had any notice of any defects.

6th. That plaintiffs cannot recover from the drawers the loss sustained by them, should the judgment be unreversed.

And afterwards, to wit, on the 28th day of January, A. D. 1851, an entry was made on the minutes, as follows, viz :

ARTHURS, NICHOLSON & Co., vs. JESSE HART. } No. 1841.

On motion of Livingston, esquire, ordered that the motion herein made for a new trial, be set down to be tried for Saturday, the 1st of February next, at 9 o'clock, a. m., and that defendant be notified thereof.

And on the 2d day of April, A. D. 1851, the following order was made and entered of record on the minutes:

ARTHURS, NICHOLSON & Co., vs. JESSE HART. } No. 1841.

On application of the parties, ordered, that this cause be continued until to-morrow morning, at 9 o'clock.

And on the 3d day of April, A. D. 1851, the following entry was made on the minutes, viz:

ARTHURS, NICHOLSON & Co., vs. JESSE HART. } No. 1841.

This cause having been continued until this day, was called for trial; Livingston, esq., for plaintiff, and E. L. Goold for defendant. After argument of counsel, the cause was submitted to the court and taken under advisement.

And afterwards, to wit, on the 9th day of April, A. D. 1851, the following judgment was rendered by the court and recorded in the minutes:

ARTHURS, NICHOLSON & Co., vs. JESSE HART. } No. 1841.

This cause having been argued and submitted on a former day, and the court having considered the same, doth now order, adjudge, and decree, that the plaintiffs, Arthurs, Nicholson & Co., do have and recover judgment against the defendant, Jesse Hart, for the sum of seventeen hundred and forty-three dollars and fifty cents, ($1743 50,) with interest thereon at the rate of five per cent. per annum, from the eleventh June, eighteen hundred and forty-nine, with four dollars and thirty cents costs of protest and costs of suit.

Bill of exceptions, filed nunc pro tunc, as of 3d April, on 9th April, 1851.

ARTHURS, NICHOLSON & Co., vs. JESSE HART. } No. 1841.

Circuit court, United States.

Be it remembered, that, on the trial of this cause, the defendant offered to prove, by the testimony of Francis Armstrong, that Mr. Arthur, Mr. Nicholson, and witness, went to the levee on board the steamboat Luna, to see Captain Hart in reference to the second payment; that he (Captain Hart) complained that the machinery had not worked well, that it was not then running; that he complained, that, from the

bad working of the sugar mill and engine, he had lost juice, and he required us to deduct the interest then due; that Messrs. Arthur and Nicholson suggested that Captain Hart should accept a bill of exchange for the balance then due, after deducting the interest; that it was understood that the sugar mill and engine were to be put in first rate order, and that Captain Hart then agreed to accept a bill; to the introduction of said evidence, or of any conversation, or of any agreement and understanding of the parties, previous to and at the time of accepting the bill sued upon, the plaintiff objected, for the reason that such evidence, or conversation, or agreement, or understanding, would tend to convert an absolute into a conditional acceptance; that it would either vary and contradict the written agreement entered into by the parties; and plaintiffs also objected to the competency of the witness, Francis Armstrong, to testify in this case, for the reason that he was one of the drawers of the bill of exchange sued upon. All of which objections were overruled by the court; to which ruling plaintiffs excepted, and tendered this their bill of exceptions, which is filed and signed by the court.

THEO. H. McCALEB, [SEAL]
U. S. judge.

And afterwards, to wit, on the 14th day of April, A. D. 1851, the final judgment rendered herein was entered of record in the judgment docket, and signed by the judge of the court, in the words and figures following, to wit:

Circuit court of the United States, 5th circuit, and eastern district of Louisiana, December term, 1850.

NEW ORLEANS, *Wednesday, 9th April,* 1851.

Court met pursuant to adjournment. Present, hon. Theodore H. McCaleb, district judge; absent, hon. J. McKinley, presiding judge.

ARTHURS, NICHOLSON & Co.,
vs.
JESSE HART. } 1841.

This case having been argued and submitted on a former day, and the court having considered the same, doth now order, adjudge, and decree that the plaintiffs, Arthurs, Nicholson & Co., do have and recover judgment against the defendant, Jesse Hart, for the sum of seventeen hundred and forty-three dollars and fifty cents, $1,743 50, with interest thereon at the rate of five per cent. per annum, from the eleventh June, eighteen hundred and forty-nine, with four dollars and thirty cents, costs of protest and costs of suit.

Judgment rendered 9th April, 1851.

Judgment signed 14th April, 1851.

THEO. H. McCALEB, [SEAL.]
U. S. judge.

Petition for writ of error, filed May 14th, 1851.

Circuit court of the United States, for eastern district of Louisiana.

ARTHURS, NICHOLSON & CO., vs. JESSE HART. } 1841.

To the honorable the judges of the circuit court of the United States, for the eastern district of Louisiana.

Your petitioners, Arthurs, Nicholson & Co., plaintiffs in the above entitled cause, represent that they are advised and believe that there is error in the judgment rendered by this honorable court in this case, and that they feel aggrieved thereby; wherefore they pray a writ of error to the next December term of the Supreme Court of the United States to correct the errors, if such exist; and they pray that, on filing bond to be approved by this honorable court, said writ of error may operate as a supersedeas. And as in duty bound, &c.

J. LIVINGSTON,
Attorney for plaintiffs.

And afterwards, to wit, on the 14th day of May, A. D. 1851, the following order was made by the court, and entered of record on the minutes, viz:

ARTHURS, NICHOLSON & CO., vs. JESSE HART. } No. 1841.

On motion of J. Livingston, esq., attorney for plaintiffs, and on filing his petition representing to the court that he feels aggrieved by the judgment herein rendered, and praying that a writ of error may be allowed him, returnable to the next term of the Supreme court of the United States, it is ordered that a writ of error be allowed as prayed, on said plaintiffs giving bond in the penal sum of twelve hundred dollars, with James Nimick as security, conditioned according to law.

Bond. Filed 28th May, 1851.

Know all men by these presents, that we, Arthurs, Nicholson & Co., principals, and James Nimick, of New Orleans, as surety, are held and firmly bound unto Jesse Hart in the full and just sum of five hundred dollars, to be paid to the said Jesse Hart or his certain attorney, executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 28th May, in the year of our Lord one thousand eight hundred and fifty-one.

Whereas lately, at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the eastern district of Louisiana, in a suit depending in said circuit court, wherein Arthurs, Nicholson & Co. are plaintiffs, and Jesse Hart is defendant, judgment was rendered against the said Jesse Hart, defendant, and the said Arthurs, Nicholson

& Co. having obtained a writ of error and filed a copy thereof in the clerk's office of the said circuit court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Jesse Hart, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Arthurs, Nicholson & Co. shall prosecute their writ to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

ARTHURS, NICHOLSON & CO., [L. S.]
Per J. LIVINGSTON, *attorney*,
J. NIMICK.

Sealed and delivered in the presence of—
JOHN LIVINGSTON.

UNITED STATES OF AMERICA,
Circuit court of the United States,
Fifth circuit and eastern district of Louisiana.

CLERK'S OFFICE.

I, John W. Gurley, clerk of the circuit court of the United States, for the fifth circuit and eastern district of Louisiana, do hereby certify, that the foregoing thirteen pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had in the case of Arthurs, Nicholson & Co., vs. Jesse Hart, No. 1841 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 21st day of June, A. D. 1851.
[SEAL.]
J. W. GURLEY, *Clerk.*

I, Theodore H. McCaleb, United States judge for the eastern district of Louisiana, do hereby certify, that John W. Gurley, whose name is signed to the above certificate as clerk of the circuit court of the United States, for the fifth circuit and eastern district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court: that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand and seal, at the city of New Orleans, in said district, this 21st day of June, A. D. 1851.

THEO. H. McCALEB. [SEAL.]

UNITED STATES OF AMERICA, *ss.*

The President of the United States, to the honorable the judges of the circuit court of the United States, in and for the fifth circuit, and holding sessions for the eastern district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you,